NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

HUMBERTO ARELLANO-CABRERA, Petitioner, v. ALBERTO R. GONZALES, Attorney General, Respondent.	No. 03-74678 Agency No. A93-203-842 MEMORANDUM[*]

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted March 9, 2006[**]
Pasadena, California

Before: WARDLAW and RAWLINSON, Circuit Judges, and CEBULL[***], District Judge.

[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[**] This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable Richard F. Cebull, U.S. District Judge for the District of Montana, sitting by designation.

Humberto Arellano-Cabrera, a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals' (BIA) dismissal of his appeal from an Immigration Judge's denial of his application for cancellation of removal and voluntary departure. We dismiss in part and deny in part the petition for review.

The BIA declined to address Arellano-Cabrera's arguments regarding his continuous physical presence in the United States because it found that "he does not merit cancellation of removal in the exercise of discretion." We lack jurisdiction to review this discretionary determination. *See Romero-Torres v. Ashcroft*, 327 F.3d 887, 890 (9th Cir. 2003). In any event, Arellano-Cabrera's arguments concerning the Immigration Judge's alleged miscalculation of the continuous physical presence factor fall by the wayside in light of the BIA's discretionary determination that Arellano-Cabrera's negative equities, including "abuse of the very immigration laws under which he now seeks shelter," were not outweighed by the countervailing positive factors. Nor do we have jurisdiction to review the discretionary denial of voluntary departure. *See id.*

We also lack jurisdiction to consider Arellano-Cabrera's argument that the INS denied him due process by waiting until after the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified as amended in 8 U.S.C. (2000)),

to serve him the Notice To Appear, which commenced his removal proceedings. *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 598-99 (9th Cir. 2002).

We do have jurisdiction to consider Arellano-Cabrera's contention that he should be allowed to apply for suspension of deportation, a remedy available to him before IIRIRA's effective date, because application of the more stringent standards for cancellation of removal was impermissibly retroactive. This argument, however, is foreclosed by our decisions in *Jimenez-Angeles*, 291 F.3d at 602; *Vasquez-Zavala v. Ashcroft*, 324 F.3d 1105, 1108 (9th Cir. 2003); and *Lopez-Urenda v. Ashcroft*, 345 F.3d 788, 793-94 (9th Cir. 2003), *as amended*. Arellano-Cabrera could have had no "settled expectation[]," *INS v. St. Cyr*, 533 U.S. 289, 321 (2001) (internal quotation marks omitted), that he would be eligible for the remedy of suspension of deportation upon the denial of his application for asylum under the Special Agricultural Worker program in 1989. *See Lopez-Urenda*, 345 F.3d at 795. Indeed, his very filing of that application indicated his good faith belief that it would be granted, not denied. *Id.* at 793-94. Therefore the BIA did not impermissibly apply IIRIRA's removal procedures.

DENIED in part, DISMISSED in part.